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Antitrust: Preseason Football Tickets and Tie-Ins, Coniglio v. Highwood Services, Inc., 495 F.2d 1286 (2d Cir. 1974)

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ANTITRUST: PRESEASON FOOTBALL TICKETS AND TIE-INS

Coniglio v. Highwood Services, Inc., 495 F.2d 1286 (2d Cir. 1974)

Plaintiff, a season ticket holder[1] of defendant's Buffalo Bills football team, instituted a class action, alleging that the requirement that purchasers of regular season tickets also buy exhibition game tickets[2] constituted an illegal tying arrangement under section 1 of the Sherman Act.[3] The federal district court granted defendant's motion for summary judgment.[4] The Court of Appeals for the Second Circuit af-

1. Season ticket holders are entitled to preferential seating in the Buffalo Bills stadium and preferential options in the purchase of tickets for post-season playoff games. Coniglio v. Highwood Servs., Inc., 495 F.2d 1286, 1288 (2d Cir. 1974).

2. Season ticket holders had to purchase tickets for one exhibition game in 1966, two in 1968 and three in 1970. *Id.*

3. 15 U.S.C. § 1 (1970) states in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Plaintiff argued that because exhibition and regular season games were separate products, and because season and individual game tickets were separate products, Highwood Services, Inc. had created a tie between the season tickets and the exhibition tickets which was either unreasonable or illegal per se. Brief for Appellant at 5-18, Coniglio v. Highwood Servs., Inc., 495 F.2d 1286 (2d Cir. 1974). Plaintiff also alleged that Highwood Services, Inc., the National Football League, and Pete Rozelle (the League's president) had conspired to restrain trade in violation of § 2 of the Sherman Act, 15 U.S.C. § 2 (1970). Brief for Appellant at 26, Coniglio v. Highwood Servs., Inc., 495 F.2d 1286 (2d Cir. 1974).

Highwood Services, Inc. contended that: exhibition games and season games were one product; season game tickets were the same product as the sum of all the individual game tickets; and even if a tie existed, there was no anticompetitive effect. Brief for Appellees at 12-20, Coniglio v. Highwood Servs., Inc., 495 F.2d 1286 (2d Cir. 1974).

4. Coniglio v. Highwood Servs., Inc., 1973-2 Trade Cas. 95,554 (W.D.N.Y.). The district court judge, in a two-paragraph opinion, reasoned that "[b]ecause the buyer is free to buy either a season ticket or individual game tickets, there is no tying problem . . . ." *Id.* The argument assumes that the exhibition games are a separate product from the season games, and that the season game ticket is the sum of the individual game tickets.

Five other district courts have heard similar suits against National Football League teams and granted summary judgment for defendants. Rubin v. Miami Dolphins, Ltd., Civil No. 74-129 (S.D. Fla., May 22, 1974), *cited in* Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321, 322 (5th Cir. 1974); Grossman Dev. Co. v. Detroit Lions, Inc., 1973-2 Trade Cas. 95,538 (E.D. Mich.), *aff'd*, 503 F.2d 1404 (6th Cir. 1974) (unpublished opinion); Laing v. Minnesota Vikings Football Club, Inc., 372 F. Supp. 59 (D. Minn. 1973), *aff'd per curiam*, 492 F.2d 1381 (8th Cir.), *cert. denied*, 419 U.S. 832 (1974); Driskill v. Dallas Cowboys Football Club, Inc., 1973-1 Trade Cas. 94,401 (N.D. Tex.), *aff'd*, 498 F.2d 321 (5th Cir. 1974); Pfeiffer v. New England Patriots Foot-

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firmed and *held*: Since the defendant had monopolies over both the exhibition and regular season game markets, the tying arrangement between the two separate monopolized products had no anticompetitive effect and therefore did not violate the Sherman Act.[5]

The Sherman Act, which proscribes "[e]very contract . . . in restraint of trade,"[6] has been construed to prohibit only unreasonable restraints of trade.[7] Nonetheless, certain arrangements are always considered unreasonable and are thus illegal per se.[8] In *Northern Pacific*

ball Club, Inc., 1973-1 Trade Cas. 93,265 (D. Mass. 1972), *appeal dismissed*, Civil No. 72-1306 (1st Cir., Nov. 1, 1972). The federal district courts have held that the tie-in does not have any anticompetitive effect, Grossman Dev. Co. v. Detroit Lions, Inc., *supra*; Driskill v. Dallas Cowboys Football Club, Inc., *supra*, or that individual tickets are the same as season tickets, or exhibition games and season games are the same, such that there are not two products to be "tied" together, Laing v. Minnesota Vikings Football Club, Inc., *supra*; Driskill v. Dallas Cowboys Football Club, Inc., *supra*; Pfeiffer v. New England Patriots Football Club, Inc., *supra*. The latter argument is based on the definition of a tie-in, *see* note 10 *infra*. Unless the seller offers the tying product only on the condition that the tied product is also purchased, there is no tie-in. If season tickets are only the sum of individual game tickets, there is no exclusive tie because the products may be purchased individually.

5. Coniglio v. Highwood Servs., Inc., 495 F.2d 1286 (2d Cir. 1974).

6. 15 U.S.C. § 1 (1970), *quoted in part* note 3 *supra*.

7. Standard Oil Co. v. United States, 221 U.S. 1 (1911). For a detailed history and analysis of the rule of reason, see Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965).

8. *See, e.g.*, United States v. Sealy, Inc., 388 U.S. 350 (1967) (horizontal territorial restraints); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (boycott); Fashion Originator's Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) (boycott); United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (price fixing agreement). The rationale for the creation of these per se categories is based upon the Court's conclusion that

> there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation . . . .

Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); *accord*, United States v. Topco Associates, Inc., 405 U.S. 596, 609-10 (1972).

> The creation of the per se categories is the culmination of experience and analysis wherein it has been ascertained that such conduct will be unreasonable, that is, that the conduct involves such an anticompetitive purpose and effect as to outweigh any business justification in the overwhelming proportion of its occurrences and can therefore be found to be illegal after mere identification.

Note, *Tie-out—A Case for the Extension of Tying Theory*, 35 OHIO ST. L.J. 140, 142 (1974); *see* Wheeler, *Some Observations on Tie-ins, the Single Product Defense, Exclusive Dealing and Regulated Industries*, 60 CALIF. L. REV. 1557 (1972); Note, *Tying Arrangements and Antitrust Policy*, 60 NW. U.L. REV. 626 (1960).

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Railway v. United States[9] the Supreme Court held that tying arrangements[10] were illegal per se if the party "has sufficient economic power

9. 356 U.S. 1 (1958).

10. [A] tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.

Id. at 5-6 (footnotes omitted).

The earliest and most common type of tie-in arrangements were agreements under which the owner of a patented article would license another's use of the patent only on the condition that the licensee also purchase certain unpatented articles from the patent owner. At first these agreements were found not to be violative of the Sherman Act. *See, e.g.*, Henry v. A.B. Dick Co., 224 U.S. 1 (1912). Later cases held to the contrary. *See, e.g.*, Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917) (overruling *A.B. Dick*). Patent tying arrangements were also held to constitute violations of § 3 of the Clayton Act, 15 U.S.C. § 14 (1970), because they "necessarily lessen competition." United Shoe Mach. Corp. v. United States, 258 U.S. 451, 457 (1922). "'The very existence of such restriction suggests that in its absence a competing article of equal or better quality would be offered at the same or at a lower price.'" Carbice Corp. of America v. American Patents Dev. Corp., 283 U.S. 27, 32 n.2 (1931), *quoting* VAUGHAN, ECONOMICS OF OUR PATENT SYSTEM 125-27.

These allegations of patent misuse and antitrust violation, challenging the validity of conditions imposed upon the license of a patent, were generally raised as a defense in patent infringement actions. As a remedy, courts have refused to enforce such conditions. *See, e.g.*, Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680 (1944) (combination patent on hot air furnace, tying in fan switch); Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944) (same); Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942) (patent on salt depositing machine, tying in salt); Carbice Corp. of America v. American Patents Dev. Corp., *supra; cf.* Leitch Mfg. Co. v. Barber Co., 302 U.S. 458 (1938) (patent on process for using coal emulsion for road construction, tying in coal emulsion).

Finally, in International Salt Co. v. United States, 332 U.S. 392, 396 (1947), the Court found it "unreasonable, per se, to foreclose competitors from any substantial market." This statement was reasserted by the Court in United States v. Columbia Steel Co., 334 U.S. 495, 552 (1948) (dictum): "A restraint may be unreasonable . . . because it falls within the class of restraints that are illegal per se." The results in these two cases are based upon the belief that

> [t]ying arrangements serve hardly any purpose beyond the suppression of competition. . . . In the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one.

Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949).

For a history of tying arrangements, see Abrams, *Tying Arrangements and Exclusive Dealing Contracts*, 53 CHI. BAR RECORD 75 (1971); McCarthy, *Trademark Franchising and Antitrust: The Trouble with Tie-ins*, 58 CALIF. L. REV. 1085 (1970); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958); Wolfstone, *Antitrust Tying Arrangements:* Fortner, *FTC and Statutory Remedies for Automobile Franchise Abuses*, 52 ORE. L. REV. 237 (1973); Note, *Tie-out—A Case*

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with respect to the tying product to restrain appreciably free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."[11]

After *Northern Pacific*, courts recognized a defense to the per se rule. A defendant may claim that there is but one product involved and therefore no tie exists. This fact can be proved in several ways: as a matter of market analysis there is only one product;[12] as a matter

for the Extension of Tying Theory, *supra* note 8; 1 LOYOLA U. (of Chicago) L.J. 132 (1970).

11. 356 U.S. at 6. The requirements have been modified and explained by subsequent cases. Tie-in arrangements may be either unreasonable or illegal per se. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 499-500 (1969). Normally, the "'not insubstantial' amount of interstate commerce" requirement will be satisfied if the total amount of business foreclosed by the tie is "substantial enough in terms of dollar volume so as not to be merely de minimus." *Id.* at 501. The sufficient economic power requirement may be satisfied

> whenever the seller can exert some power over some of the buyers in the market . . . . the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.

Id. at 503-04. Such power may be inferred from the uniqueness or desirability of the tying product. *See, e.g.*, United States v. Loew's Inc., 371 U.S. 38 (1962) (copyright); International Salt Co. v. United States, 332 U.S. 392 (1947) (patent); Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (trademark). To maintain a private antitrust action, it may be necessary to prove that this economic power was exercised. *See* American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972); Capital Temporaries, Inc. v. Olsten Corp., 365 F. Supp. 888 (D. Conn. 1973); Abercrombie v. Lum's Inc., 345 F. Supp. 387 (S.D. Fla. 1972); N.W. Controls, Inc. v. Outboard Marine Corp., 333 F. Supp. 493 (D. Del. 1971).

For a discussion and brief analysis of the "sufficient power" and "not insubstantial commerce" requirement, see Note, *Tie-out—A Case for the Extension of Tying Theory*, *supra* note 8; Note, *Per Se Doctrine—Tying Arrangements and the Market Power Requirement*, 8 TULSA L.J. 235 (1972).

Tying arrangements may also be found unreasonable per se under § 3 of the Clayton Act, 15 U.S.C. § 14 (1970), but the standards for per se illegality are different. *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608-09 (1953). Section 3 of the Clayton Act is limited to "goods, wares, merchandise, machinery, supplies, or other commodities . . . ." Advance Bus. Sys. & Supply Co. v. SCM Corp., 415 F.2d 55, 64 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (section 3 of the Clayton Act not applicable when either the tying or tied product is a service).

12. The first case to accept this "single product" defense was Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 613 (1953), which assumed that the items sold were fungible. As a federal district court noted, however,

> this rule is easier to state than to apply because antitrust decisions and literature contain astonishingly little discussion of the criteria to be applied to distinguish between component parts of a single product and a multiplicity of products.

N.W. Controls, Inc. v. Outboard Marine Corp., 333 F. Supp. 493, 501 (D. Del. 1971).

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of business practice the tie is necessary to protect the good will of the business;[13] or as a matter of business practice the tie is necessary to

"The tests for determining when two products, rather than one, are involved in an illegal tie-in have never been conclusively established by the Supreme Court." Note, *Product Separability: A Workable Standard to Identify Tie-in Arrangements Under the Antitrust Laws*, 46 S. CAL. L. REV. 160, 163 (1972). It has been held that morning newspaper advertisements are the same product as evening advertisements, Times-Picayune Publishing Co. v. United States, *supra*, but that the sponsorship of a television program over ninety-five desirable stations is a separate product from the sponsorship of the same program over another thirty-five undesirable stations, American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 221 F. Supp. 848, 850 (S.D.N.Y. 1963), *rev'd on other grounds*, 446 F.2d 1131 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

That the industry is new and that its goodwill may be at stake have been held to be legitimate reasons for tying two products together as a single product. United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 556 (E.D. Pa. 1960), *aff'd per curiam*, 356 U.S. 567 (1961). This "legitimate reasons" justification for inseparability has been recognized or employed elsewhere. *See, e.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); Tripoli Co. v. Wella Corp., 425 F.2d 932 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970); Advance Bus. Sys. & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965); Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961); N.W. Controls, Inc. v. Outboard Marine Corp., 333 F. Supp. 493 (D. Del. 1971). Although the Supreme Court has never explicitly accepted the "legitimate reasons" defense, it has indicated that it might accept it. *See* Fortner Enterprises, Inc. v. United States Steel Corp., *supra*.

The illogic of adopting a "legitimate reasons" defense to prove a per se violation of the Sherman Act would seem apparent from the rationale of employing the per se test in the first instance. *See* note 8 *supra*. The defense merely shifts the burden of proof, under the rule of reason analysis, to the defendant.

> Thus it will be seen that the court's decision does not really turn on the question of inseparability. In fact, by basing its decisions on 'sound business reasons' the court would seem to presuppose that there are two separate products.

Associated Press v. Taft-Ingalls Corp., 340 F.2d 753, 762 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965). The courts, however, have accepted the defense only in unique factual circumstances. *See, e.g.*, Dehydrating Process Co. v. A.O. Smith Corp., *supra* (defendant, who owned a patented glass-lined silo and manufactured unloading equipment for silo, tied equipment into sale of patented silo because no other commercial unloading equipment would operate correctly); United States v. Jerrold Electronics Corp., *supra* (defendant, who sold community antennas in new industry with new technology and had the only trained workmen for the technology, tied service contract and replacement parts into sale of antenna system). *See* Abrams, *supra* note 10; Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 WIS. L. REV. 88 (1967); McCarthy, *supra* note 10; Wheeler, *supra* note 8; Wolfstone, *supra* note 10; Note, *Tying Arrangements and the Single Product Issue*, 31 OHIO ST. L.J. 861 (1970); Note, *Product Separability: A Workable Standard to Identify Tie-In Arrangements Under the Antitrust Laws*, *supra*.

13. *See, e.g.*, Susser v. Carvell Corp., 332 F.2d 505 (2d Cir.), *cert. denied*, 379 U.S.

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protect a new industry.[14] If the defendant does not place himself within one of these categories,[15] the arrangement will be held illegal per se and evidence of its reasonableness will not be admitted.[16]

Following the reasoning of the Supreme Court in *Northern Pacific*, the Second Circuit in *Coniglio v. Highwood Services, Inc.*[17] found that there were four aspects to a per se illegal tying arrangement:

> (1) two separate and distinct products, a tying product and a tied product; (2) sufficient economic power in the tying market to coerce purchase of the tied product; (3) anti-competitive effects in the tied market; and (4) involvement of a "not insubstantial" amount of interstate commerce in the tied market.[18]

The court found that the facts of the case easily satisfied the requirements of sufficient economic power[19] and a "not insubstantial" amount

855 (1964). *But see* Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). The Supreme Court has never accepted the good will defense. *See* Standard Oil Co. v. United States, 337 U.S. 293, 306 (1949) (dictum); International Bus. Mach. Corp. v. United States, 298 U.S. 131 (1936).

14. *See, e.g.*, Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

15. Although some commentators have treated these defenses as separate allegations, *e.g.*, Austin, *supra* note 12; McCarthy, *supra* note 10; others argue that Jerrold Electronics v. United States, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 561 (1961), stands for the proposition that if the defendant has any "legitimate reasons" for tying items together then those items will be treated as one product, *e.g.*, Wheeler, *supra* note 8; Wolfstone, *supra* note 10.

16. International Salt Co. v. United States, 332 U.S. 392, 396 (1947).

17. 495 F.2d 1286 (2d Cir. 1974).

18. *Id.* at 1289.

19. The court concluded:

> Although the question is indeed a close one, we believe that, despite the relatively large quantity of individual game tickets available here, the district court's conclusion, that as a matter of law the requisite coercive power was absent, is erroneous.

Id. at 1290. Although correct, the court's asserted difficulty in reaching that conclusion is perplexing. The court later stated that Highwood had "a monopoly over the presentation of regular season professional football games." *Id.* at 1291. Supreme Court decisions have held that the sufficient economic power requirement may be satisfied by a monopoly, United States v. Loew's Inc., 371 U.S. 38 (1962) (copyright); International Salt Co. v. United States, 332 U.S. 392 (1947) (patent), or an inherently unique product, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (land). *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969). The *Coniglio* court appears to have defined sufficient economic power in terms of the market demand for the product. To define economic power in this manner, however, simply redefines the phrase in terms of how the power is exercised. If Highwood Services, Inc. had a monopoly on the regular season professional football tickets, then presumably it could have refused to sell any individual game tickets and offered, instead only season tickets includ-

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of interstate commerce,[20] and that the distinction between exhibition and regular season games was "sufficiently sharp" to present a triable issue of fact inappropriate for summary judgment.[21] The court reasoned, however, that, since the defendant had monopolized exhibition and season game tickets, the tying arrangement did not foreclose any competition. Because an anticompetitive effect is a necessary element of a per se illegal tying arrangement, the Second Circuit affirmed the summary judgment of the claim.[22]

The court's opinion created a blanket defense to the per se rule for the owner of two separate monopolies. The defense presumes that the coercion of consumers to buy undesired products has no anticompetitive effect.[23] The court recognized the general rule that tying one

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ing tied-in exhibition game tickets. The fact that a defendant does not exercise its power is irrelevant for purposes of finding per se illegality. Northern Pac. Ry. v. United States, *supra* at 10-11; International Salt Co. v. United States, *supra* at 400.

20. 495 F.2d at 1290; *accord*, International Salt Co. v. United States, 332 U.S. 392 (1947) (approximately $500,000 in commerce held sufficient).

21. 495 F.2d at 1291. The absence of any explicit standards in the court's decision on this question is consistent with prior cases. *See, e.g.*, N.W. Controls, Inc. v. Outboard Marine Corp., 333 F. Supp. 493 (D. Del. 1971). Presumably, the court based its decision on the two distinctions alleged by the plaintiff: the unimportance of the won-lost record of exhibition games, and the experimental aspect of the preseason. Defendants alleged no "legitimate reasons" for tying the two items together.

22. 495 F.2d at 1291.

> [J]ust as the Bills has a monopoly over the presentation of regular season professional football games . . . so too does it have a monopoly over the presentation of exhibition professional football games—the tied product. Thus, Highwood is not using its economic power in the tying (season ticket) market to "restrain free competition in the market for the tied product . . . .

Id. (footnote omitted). The nearest competitor in the professional football market is in Cleveland, Ohio.

23. Many cases have noted that coercion of consumers is one of the evils at which the Sherman Act is directed. *See, e.g.*, United States v. Loew's Inc., 371 U.S. 38, 44-45 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1, 10-11 (1958), *quoting* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953):

> By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of the buyer's independent judgment as to the "tied" product's merits and insulates it from the competitive stress of the open market.

In Fortner Enterprises, Inc., v. United States Steel Corp., 394 U.S. 495 (1969), the Court, after noting that even a monopolist could not have complete power over the buyer because some buyers would refuse to buy the product, stated:

> [D]espite the freedom of some or many buyers from the seller's power, other buyers—whether few or many, whether scattered throughout the market or part of some group within the market—can be forced to accept the higher price because of their stronger preferences for the product . . . .

Id. at 503-04; *accord*, Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965). In all of these cases, however, both coercion and

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product to another monopolized product is a violation of the Sherman Act,[24] but asserted that if the first product was also monopolized the arrangement was immune from antitrust prosecution.[25] Although both of the requirements for per se illegality established by *Northern Pacific* were met,[26] the court avoided a finding of illegality by restricting the coverage of the Sherman Act to instances where actual or potential competitors had been foreclosed.[27] This restriction upon the Sherman Act is difficult to reconcile with the Supreme Court's long-held belief that tying arrangements "serve hardly any purpose beyond the suppression of competition."[28]

Furthermore, the court's decision was inconsistent with analogous cases that hold owners of patents and other government-created monopolies liable for violations of the per se rule against tying arrangements.[29] Presumably, since the defendants in *Coniglio* were permitted

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foreclosure of competitors were present. Therefore, *Coniglio* is a case of first impression: The court asserted, in a case that arguably did not present foreclosure of competition, that when only the coercion of consumers is present no antitrust violation can be found. *See* Note, *Tie-out—A Case for the Extension of Tying Theory*, *supra* note 8.

24. 495 F.2d at 1291-92. Generally, any tying arrangement is violative of the Sherman Act if the "sufficient economic power" and the "not insubstantial amount of commerce" requirements are met. *See, e.g.*, United States v. Loew's Inc., 371 U.S. 38 (1962); International Salt Co. v. United States, 332 U.S. 392 (1947).

25. 495 F.2d at 1291-92: "Accordingly, the tying arrangement attacked by Coniglio does not fall within the realm of contracts 'in restraint of trade or commerce' proscribed by Section 1 of the Sherman Act."

26. *See* text accompanying note 11 *supra*.

27. The court's finding could be interpreted as establishing a third requirement for per se illegality. The language used by the court, however, *see* notes 22 & 25 *supra*, argues to the contrary. In addition, the court concluded, "the propriety of summary judgment in this case rests on Coniglio's total failure to demonstrate an adverse effect on competition, actual or potential . . . ." 495 F.2d at 1292-93. Moreover, the suggested interpretation would render the *Coniglio* decision inconsistent with all of the per se tie-in cases. *See, e.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); United States v. Loew's Inc., 371 U.S. 38 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); International Salt Co. v. United States, 332 U.S. 392 (1947). As the Court held in *Fortner*, failure to prove a per se violation is not fatal to a plaintiff's case and summary judgment is improper. The better interpretation of the *Coniglio* decision is that a failure to prove some actual or potential anticompetitive effect will constitute a failure to show that the contract falls under the purview of the Sherman Act. The issue of the contract's reasonableness thus becomes irrelevant.

28. Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949).

29. United States v. Loew's Inc., 371 U.S. 38 (1962) (copyright); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (land); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (copyright); International Salt Co. v. United States, 332 U.S. 392 (1947) (patent); Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944)

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to tie monopolized products together, the owner of two patents could license his patents in the same manner. Such "package licensing," however, constitutes patent misuse.[30] The decisions have reasoned that the tie constitutes an unlawful extension of the patent monopoly[31] since the patent only protects the invention and "not that invention plus some embellishment . . . which also happens to be patented."[32] If government-created monopolies may not be tied into a single package, football game monopolies should not be treated differently.[33] The

(patent); Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (trademark); Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir. 1965) (property rights "comparable to a copyright"); Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir. 1961) (patent); *see* note 10 *supra*.

30. *See* note 10 *supra*. There are many parallels between patent misuse and Sherman Act violations. The early tie-in cases arose under claims of patent misuse. Patent tie-ins were also the first tie-in cases held to violate the Sherman Act and to constitute a per se unreasonable contract. *Id.* But, in Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680, 684 (1944), the Court asserted that "the legality of any attempt to bring unpatented goods within the protection of the patent is measured by the antitrust laws and not by the patent law . . . ." This statement has caused some confusion between patent misuse and antitrust violations. *Compare* Preformed Line Prods. Co. v. Fanner Mfg. Co., 328 F.2d 265 (6th Cir.), *cert. denied*, 329 U.S. 846 (1964), *with* Berlenbach v. Anderson & Thompson Ski Co., 329 F.2d 782 (9th Cir.), *cert. denied*, 379 U.S. 830 (1964).

Package licensing is prohibited per se only when the seller refuses to sell the product separately. American Securit Co. v. Shatterproof Glass Corp., 268 F.2d 769 (3d Cir.), *cert. denied*, 361 U.S. 902 (1959); *accord*, McCullough Tool Co. v. Well Surveys, Inc., 343 F.2d 381 (10th Cir. 1965), *cert. denied*, 383 U.S. 933 (1966); International Mfg. Co. v. Landon, Inc., 336 F.2d 723 (9th Cir. 1964), *cert. denied*, 379 U.S. 988 (1965); Valmont Indus., Inc. v. Yuma Mfg. Co., 296 F. Supp. 1291 (D. Colo. 1969); Turbo Mach. Co. v. Proctor & Schwartz, Inc., 241 F. Supp. 723 (E.D. Pa.), *aff'd*, 362 F.2d 5 (3d Cir. 1965); Eversharp, Inc. v. Fisher Pen Co., 204 F. Supp. 649 (N.D. Ill. 1961); Libbey-Owens-Ford Glass Co. v. Sylvania Indus. Corp., 64 F. Supp. 516 (S.D.N.Y. 1945), *appeal dismissed*, 154 F.2d 814 (2d Cir.), *cert. denied*, 328 U.S. 859 (1946).

31. The patentee may put forth a single-product defense, *see* International Mfg. Co. v. Landon, Inc., 336 F.2d 723 (9th Cir. 1964), *cert. denied*, 379 U.S. 988 (1965), or argue that the allegedly tied products are available separately, *see* McCullough Tool Co. v. Well Surveys Co., 343 F.2d 381 (10th Cir. 1965), *cert. denied*, 383 U.S. 933 (1966); Valmont Indus., Inc. v. Yuma Mfg. Co., 296 F. Supp. 1291 (D. Colo. 1969); Eversharp, Inc. v. Fisher Pen Co., 204 F. Supp. 649 (N.D. Ill. 1961).

32. American Securit Co. v. Shatterproof Glass Co., 268 F.2d 769, 777 (3d Cir.), *cert. denied*, 361 U.S. 902 (1959).

33. This argument, based on the patent misuse cases, was rejected in Grossman Dev. Co. v. Detroit Lions, Inc., 1973-2 Trade Cas. 95,538 (E.D. Mich.), *aff'd*, 503 F.2d 1404 (6th Cir. 1974) (unpublished opinion). "[T]hese cases are based upon the special rationale that the rights granted under the patent laws of the United States cannot be enlarged or extended in any way and any enlargement constituted patent misuse." *Id.* at 95,540. The district court, however, did not explain why the monopoly power possessed by football teams should not be similarly restricted. In addition, where the defendant

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only arguable distinction is that the professional sports leagues are unique enterprises deserving singular treatment under the antitrust laws.[34] Although some arrangements may be required for the existence of professional sports leagues, a tie-in between season and exhibition game tickets is hardly one of those "necessary arrangements" that would justify distinguishing the patent misuse cases from *Coniglio*.[35]

In addition, the holding in *Coniglio* is apparently in conflict with *United States v. Loew's Inc.*[36] In that decision the Supreme Court held that defendant's "block-booking" practice, by means of which certain attractive movies were licensed only in a block with other less attractive films, was a per se violation of the antitrust laws. The Court in *Loew's* noted that per se illegal tie-ins have two possible anticompetitive effects: the coercion of buyers to give up the purchase of substitutes for the tied products, or the destruction of access to the consuming market for competing suppliers of the tied product.[37] Sufficient

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is the owner of two patents, there seems to be little justification for the result other than a blanket prohibition of such coercion.

34. Authors have suggested that courts have employed a distinct kind of analysis when professional sports associations have been charged with antitrust violations:

> [T]he courts have generally decided the lawfulness of its arrangements . . . by balancing the alleged economic benefits against the potential evils and have allowed reasonable restraints, even when they fall into a category usually regarded as per se illegal.

Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws,* 81 HARV. L. REV. 418, 419 (1967); *see* Note, *Player Control Mechanisms in Professional Team Sports,* 34 U. PITT. L. REV. 645 (1973). The alleged practices attacked (e.g., league housekeeping rules, player restraints, and owner restraints) are peculiar and necessary to competitive sports leagues. Some economic cooperation is necessary to insure athletic competition. For example, restrictions on player mobility insures that the less profitable teams will be able to afford the more talented players and therefore be able to compete on an equal basis with the more profitable teams. It was not alleged that the exhibition game tie-in promoted athletic competition nor does it appear that such an argument could successfully defend this practice.

35. *See* note 34 *supra.*

36. 371 U.S. 38 (1962). Loew's had a series of copyrights on a number of movies, some of high quality (*e.g.,* "Gone with the Wind") and some of low quality (*e.g.,* "Getting Gertie's Garter"). These movies were released to television stations only in large blocks which included a variety of high- and low-quality movies. To obtain one of Loew's high-quality movies, stations were forced to pay for a number of other undesirable films.

37. 371 U.S. at 45.

> A tie-in contract may have one or both of these undesirable effects when the seller, by virtue of his position in the market for the tying product, has economic leverage sufficient to induce his customers to take the tied product along with the tying item.

Id.

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economic power, the first requirement of a per se illegal tying arrangement followed from the copyright, which gave the defendant a "'monopolistic' position as to each tying product . . . ."[38] The defendant's "monopolistic" position over each product did not mean, however, that there was no anticompetitive effect. The Court reasoned that although each of the desired films "'was itself a unique product'"[39] and not fungible, the less desirable films, while also distinct, were in competition with other films and programming material.[40] This competition was suppressed by the tie-in arrangement.[41]

38. *Id.* at 48.

39. *Id., quoting* United States v. Loew's Inc., 189 F. Supp. 373, 381 (S.D.N.Y. 1960).

40. 371 U.S. at 49. The Court did not explain how to distinguish desirable and undesirable films or films that are in competition with other programing materials and films that are not. The Court simply noted that "the distinctiveness of the copyrighted tied product is not inconsistent with the fact of competition, in the form of other programing material and other films, which is suppressed by the tying arrangements." *Id.*

41. *Id.* The most significant aspect of *Coniglio* was the recognition that similar but separate "monopolized" products have different relevant markets based upon their desirability. The defendant's monopoly of regular season professional football games in the Buffalo area may have been a monopoly over such a unique and distinct product that he had no competition. This does not mean, however, that the defendant's exhibition games monopoly did not experience competition with other kinds of athletic entertainment as a result of a high degree of cross elasticity of demand.

Plaintiff argued that exhibition games were in competition with other types of general entertainment in the Buffalo area. The court rejected the argument as

> nothing more than the boundless contention that, by extracting extra dollars from season ticket holders, the Bills leave less in their pockets to spend on any other form of diversion . . . . Suffice to say that the extraordinary breadth of the market encompassing such diverse yet assertedly competitive products is far beyond that ever contemplated for a *relevant* product market.

495 F.2d at 1292 (emphasis original). The court seems to have suggested that an anticompetitive effect must encompass more than the mere extraction of dollars. The extraction of dollars, however, has been the major consequence of admittedly anticompetitive tie-ins. In *Loew's*, when Loew's Inc., forced television stations to purchase extra movies, it had done little more than extract extra dollars for the purchase of the higher quality movies to which the lesser quality films were tied. The contract did not prohibit television stations from purchasing other movies. Such extraction has always been held to constitute the kind of activity against which the Sherman Act was directed. The consumer, having been forced to purchase an item he did not want, is not thereafter going to purchase a substitute for the unwanted product. By coercing consumers to purchase the unwanted tied product, the competitors in that market are foreclosed.

For other package copyright cases see United States v. Paramount Pictures, Inc., 314 U.S. 131 (1948); Pape Television Co. v. Associated Artists Prod. Corp., 277 F.2d 750 (5th Cir. 1960); Field's Prod., Inc. v. United Artists Corp., 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd per curiam*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971); *accord*, Seago v. N.C. Theatres, Inc., 42 F.R.D. 627 (E.D.N.C. 1966), *aff'd per curiam*, 388 F.2d 987 (4th Cir. 1967), *cert. denied*, 390 U.S. 959 (1968).

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Even if one accepts the *Coniglio* court's assertion that the mere coercion of a consumer to buy an item that he does not desire is an insufficient ground for finding a monopoly tie-in illegal,[42] *Loew's* suggests that the *Coniglio* tying arrangement foreclosed competitors of the exhibition football games.[43] Desirable season game tickets, like desirable movies, may be sufficiently distinctive to warrant a label of monopoly. But this determination does not mean that exhibition game tickets, or undesirable movies, also constitute a monopoly and therefore have no competitors. Under the *Loew's* analysis, since the exhibition games have a lower consumer appeal than season games, the former are in competition with the sale of other products.[44] Consequently, a relevant market broader than "exhibition games" would have been appropriate.[45]

The Second Circuit was the first circuit court of appeals to render a full opinion on the exhibition game tying issue.[46] At the heart of the court's reasoning lies the assumption that coercing consumers into purchasing products they do not want is not violative of the Sherman Act. Sound antitrust policy and the increasing recognition of consumers' rights provide a firm basis for restricting the application of the *Coniglio* decision.

42. 495 F.2d at 1293.

43. The *Coniglio* court did not preclude consideration of a smaller relevant market that might have brought the tie-in within the range of the prohibition of the Sherman Act. *See* 495 F.2d at 1292. For example, a relevant market restricted to athletic entertainment might have been accepted by the court. It would, however, be inconsistent for courts, while employing the test of per se illegality, to become engrossed in extended market analysis to determine how to define the relevant market.

44. Brief for Appellants at 7, Coniglio v. Highwood Servs., Inc., 495 F.2d 1286 (2d Cir. 1974).

45. *See* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

46. The Fifth Circuit, in Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321 (5th Cir. 1974), and the Eighth Circuit, in Laing v. Minnesota Vikings Football Club, Inc., 492 F.2d 1381 (8th Cir. 1974), delivered only per curiam opinions. The Sixth Circuit's decision in Grossman Dev. Co. v. Detroit Lions, Inc., was rendered in an unpublished opinion, 503 F.2d 1404 (6th Cir. 1974).

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